

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DELGADO,

Defendant-Appellant.

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UNPUBLISHED  
February 11, 2003

No. 235105  
Wayne Circuit Court  
LC No. 00-013607

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions for assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life in prison for the assault with intent to commit murder conviction and two years in prison for the felony-firearm conviction. We affirm.

I. Alibi Jury Instructions

Defendant first argues he was denied a fair trial by the trial court's improper jury instruction regarding his alibi defense. Alternatively, defendant contends he was denied the effective assistance of counsel when his attorney failed to object to the court's erroneous instruction. We disagree.

A. Defendant Waived Challenging the Jury Instructions

Defendant argues that the trial court's alibi instruction was erroneous. However, when the trial court asked if there were any objections to the jury instructions, defense counsel replied, "We're satisfied, Judge." By expressly approving the jury instructions, defendant waived this issue on appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Lueth*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2002) (Docket No. 226717, issued 11/1/02), slip op at 8. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Carter, supra* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

B. Ineffective Assistance of Counsel

Defendant also argues that his trial counsel was ineffective for failing to object to the trial court's alibi instruction. We disagree. Because defendant failed to move for a new trial or a *Ginther*<sup>1</sup> hearing, our review is limited to the appellate record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, a defendant must show that: (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms, and (2) the representation was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In applying this test, the reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and defendant bears the heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Toma, supra* at 302. Under the prejudice prong, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Toma, supra* at 302-303. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984), on remand 737 F2d 894 (CA 11, 1984).

[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. [*People v Reed*, 449 Mich 375, 400-401 (Boyle, J.); 535 NW2d 496 (1995), quoting *Strickland, supra* at 697.]

Defendant argues that the trial court's alibi instruction impermissibly shifted the burden of proof to defendant. Defendant points to the section of the jury instructions where the trial court instructed the jury as follows: "If you do not have any doubt that the defendant was at the place at the time the crime was committed, then it would be your duty to find him guilty." Defendant argues that this instruction either shifted the burden to him to show that he did not have the intent to commit the crimes or effectively caused the jury to assume that defendant had the intent to commit the crimes.

If read in isolation, the instruction at issue seems to tell the jury to convict defendant if it merely thought he was present at the scene of the crime. However, we review a trial court's jury instructions in their entirety, and, "even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Grayer*, 252 Mich App 349, 352; 651 NW2d 818 (2002). Throughout the jury instructions, the trial court made it clear that the prosecution had the burden of proving that defendant was guilty beyond a reasonable doubt. The trial court also explained at length that the prosecution had to prove that defendant had specific intent to kill to convict him of assault with intent to commit murder. In this way, the jury was informed that, in order to convict defendant of the crimes, he not only had to be present at the location of the crime, but he

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

had to have intent to commit the crimes. If the jury had believed that defendant's presence at the scene was enough to convict him, it would have convicted defendant of both counts of assault with intent to commit murder, rather than just one count. Therefore, we conclude that defendant was not prejudiced by his trial counsel's failure to object to the alibi instruction and defendant's ineffective assistance of counsel argument must fail.

## II. Sufficiency of the Evidence

Defendant next argues that insufficient evidence was presented at trial to support his convictions. We disagree. When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The elements of assault with intent to commit murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996), quoting *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). "The intent to kill may be proven by inference from any facts in evidence." *Davis*, *supra* at 53, quoting *Warren*, *supra* at 588. "The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony." *Davis*, *supra* at 53.

Defendant argues that the evidence submitted at trial was insufficient to prove beyond a reasonable doubt that defendant assaulted Chappelle Williams, possessed a firearm, or even that defendant was present at the location of the shooting. However, Williams testified at trial that defendant approached him in a bar and shot him nine times with a handgun. Although evidence was presented that defendant was not present at the bar at the time of the shooting and that it was difficult to see the shooter, the jury apparently believed Williams' testimony that defendant committed the shooting. This Court will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Because there is evidence that defendant pointed a gun at Williams and shot him nine times, we conclude that the evidence was sufficient to find defendant guilty beyond a reasonable doubt of assault with intent to commit murder and felony-firearm.

## III. Upward Departure From Sentencing Guidelines

Defendant next claims the trial court erred in sentencing him to life imprisonment without relying on objective and verifiable factors in determining that there were substantial and compelling reasons for departing from the recommended statutory minimum sentence guidelines. Because the offenses of which defendant was convicted were committed on November 4, 2000, the legislative sentencing guidelines were used to determine the recommended range of defendant's minimum sentence. MCL 769.34(2). Generally, the trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted under MCL 769.34(3). *People v Babcock (Babcock II)*, 250 Mich App 463, 465; 648 NW2d 221, lv gtd 467 Mich 872 (2002). We review a trial court's decision to depart from the guidelines to determine if it had "a substantial and compelling reason for that departure" and stated on the record its reasons for departure. MCL 769.34(3); *People v Deline*, \_\_\_ Mich App

\_\_\_; \_\_\_ NW2d \_\_\_ (2002) (Docket No. 237307, issued 12/27/02), slip op at 2. Substantial and compelling reasons should be found to exist only in exceptional cases and the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Babcock II, supra* at 466-467.<sup>2</sup> The factors relied on by the trial court in determining whether there are substantial and compelling reasons for departure must be objective and verifiable. *Babcock II, supra* at 467. We review as a matter of law the trial court's determination that a particular factor is objective and verifiable. *Id.* A trial court's decision that the objective and verifiable factors constitute substantial and compelling reasons to depart from the sentencing guidelines is reviewed for an abuse of discretion. *Id.* In reviewing the trial court's decision to depart, we may consider factors already taken into account during guidelines scoring if we find from the facts in the record that those factors were given inadequate or disproportionate weight. MCL 769.34(3)(b); *Deline, supra*, slip op at 2.

Defendant argues that the trial court did not rely on objective and verifiable factors in departing from the guidelines and that its reasons for departure were not substantial and compelling. Again, we disagree. In departing from the guidelines, the trial court relied on factors that were both objective and verifiable. The trial court stated that it departed from the guidelines because it believed that the guidelines did not reflect the gravity of the offense. The trial court explained that defendant had shot two people a total of twelve times, shooting out one person's eye and shooting off another person's penis. The trial court noted that the offense could have been a murder if the hospital had not saved the victim's life. The trial court also stated that the shooting occurred in a crowded place where other people could have been shot. These factors considered by the trial court were objective and verifiable. Defendant does not give any reason why these objective and verifiable reasons do not constitute substantial and compelling

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<sup>2</sup> In *People v Babcock (Babcock I)*, 244 Mich App 64, 75; 624 NW2d 479 (2000), this Court interpreted the "substantial and compelling" standard in accord with the analysis set forth in *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995):

In *Fields*, our Supreme Court recognized that "the words 'substantial and compelling' constitute strong language," and found it "reasonable to conclude that the Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases." "[T]he reasons justifying departure should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." It is not enough for a factor to be merely substantial; it must be both substantial and compelling before departure is permitted, and the Legislature is presumed to "have consciously elevated the burden of proof" by its choice of the term "compelling." In keeping with the language of the statute and the intent of the Legislature, the *Fields* Court also determined that the factors relied on by the trial court must be objective and verifiable. We believe the same interpretation, with its implicit reliance on reason and common sense, is appropriate here. [*Babcock I, supra* at 75, quoting *Fields, supra* (citations omitted).]

reasons to depart from the guidelines. Therefore, we conclude that the trial court's determination that these objective and verifiable factors constituted substantial and compelling reasons to depart was not an abuse of discretion.<sup>3</sup>

#### IV. Proportionality of Defendant's Sentence

Finally, defendant argues that his sentence is disproportionately high. The principle of proportionality can be considered concerning the extent of a departure from the guidelines. *Babcock II*, *supra* at 468-469.<sup>4</sup> "This Court reviews claims of disproportionality for an abuse of discretion." *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). A defendant's sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 657; 461 NW2d 1 (1990); *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). The "key test" of proportionality is whether the sentence reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). The sentencing court must articulate on the record the reasons for the sentence imposed. *Bennett*, *supra* at 515-516. A departure from the guidelines is an indication of a possibility that the sentence is disproportionate. *Id.* In *Milbourn*, *supra* at 668-669, our Supreme Court held that the defendant's sentence was disproportionate because it left no room for the principle of proportionality to operate on an offender convicted of the same offense who had a worse prior criminal record and whose criminal behavior was more aggravated than the defendant's.

Defendant argues that his life sentence is disproportionately high because it exceeded the guidelines range and the trial court based the sentence on reasons already considered in determining the guidelines, reasons without factual foundation, or other inappropriate reasons. However, defendant does not specify which factors considered by the trial court were already considered in determining the guidelines, were without factual foundation, or were inappropriate. The trial court indicated that one of the reasons for the sentence was that the two victims were

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<sup>3</sup> Although the trial court did not specifically state on the record that its reasons for departure from the guidelines were substantial and compelling, it is clear from the record that the trial court was sentencing defendant under the legislative guidelines and that it was aware that it was departing from those guidelines. In particular, the trial court stated that the sentence under the legislative guidelines was insufficient and gave several objective and verifiable reasons why it was sentencing defendant to life imprisonment. Therefore, this case is distinguishable from cases where resentencing was required because it appeared from the record that the trial court misunderstood its sentencing role under the legislative guidelines. See *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127 (2001) and *People v Hornsby*, 251 Mich App 462, 474; 650 NW2d 700 (2002). We note that the trial court failed to comply with MCL 769.34(7), which requires the trial court to "advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range." However, because defendant appealed his sentence on grounds that it was more severe than the appropriate guidelines range, the trial court's error was harmless.

<sup>4</sup> In response to defendant's argument, the prosecution argues that the principle of proportionality does not apply to sentences imposed under the legislative guidelines. However, we note that in *Babcock II*, *supra* at 468-469, this Court specifically held that the principle of proportionality applies to departures from the legislative sentencing guidelines.

very seriously injured—one had his eye shot out and the other had his penis shot off. In scoring defendant’s sentence, the trial court assessed defendant ten points for OV 3 (physical injury to victim), MCL 777.33, because bodily injury requiring medical treatment occurred to a victim. However, it is clear from the trial court’s comments regarding the victims’ injuries that it found that this factor was not adequately accounted for in the guidelines.

The trial court explained that defendant had shot two men a total of twelve times in a crowded bar. As mentioned by the trial court, it is very lucky that neither of the victims died. These factors stated by the trial court were not considered in the guidelines. Defendant has not given any legitimate reason why the trial court abused its discretion in determining that the sentence was proportionate to the offense and offender. Therefore, we conclude that the trial court did not abuse its discretion in determining that the brutality and gravity of defendant’s actions warranted the maximum penalty under the assault with intent to commit murder statute.

Defendant also argues that his life sentence constitutes cruel and unusual punishment. However, “ ‘a proportionate sentence is not cruel and unusual.’ ” *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002), quoting *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Because defendant’s sentence is proportionate, it does not constitute cruel and unusual punishment.

Affirmed.

/s/ Brian K. Zahra  
/s/ Christopher M. Murray  
/s/ Karen M. Fort Hood